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IN THE

Supreme Court of the United States

71-374

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

STANFORD E. PARRIS, ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

CLIVE L. DuVAL, *II*, ET AL.,

Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE APPELLEE, CITY OF NORFOLK
QUESTIONS PRESENTED

I. Whether a state legislative plan is valid in which one chamber of a bicameral legislature is designed to keep political subdivisions intact, while the other chamber is designed to achieve representation by "mathematical exactness"?

II. Assuming the test for validity of state legislative reapportionment is "mathematical exactness" in both houses of a bicameral state legislature, does a political subdivision have status to object that its residents were co-mingled with residents from an abutting political subdivision?

III. Whether the District Court gave all parties an opportunity to be heard?

IV. Whether the City of Virginia Beach has status to object to the District Court's reapportionment plan?

STATEMENT OF THE CASE

The City of Norfolk intervened in the three cases advocating the validity of the General Assembly of Virginia's reapportionment plan for two reasons: (1) To maintain the integrity of the 1970 United States Census Bureau's Decennial Population Enumeration as a basis for state reapportionment; and (2) To defend the constitutionality of said reapportionment plan. (P. 46 of Vol. I of Record of *Prichard, et al* v. *DuVal, II,* et al; P. 43 of Vol. I of Record of *Prichard, et al* v. *Parris;* and P. 73 of Vol. I of *Mahan, et al* v. *Howell, et al.)*

The General Assembly of Virginia consists of two legislative chambers, the Senate and the House of Delegates. (Section 2 & 3 of Article IV of the Virginia Constitution of 1971.)

Under its reapportionment plan, one chamber of its bicameral legislature was to have forty (40) equal single member elective districts. (Joint Appendix, Pp. 31-43.)[1]

The other chamber, the House of Delegates, was to have one hundred (100) delegates made up of fifty-two election districts consisting of single member, multimember and floater districts. (Joint Appendix, P. 29.) It is uncontradicted that the House scheme pursuant to State tradition and policy is as close to the optimum percentage deviation of perfect equality that election districts could be devised, while maintaining the integrity of traditional boundary lines of political subdivisions. (Stipulation of James M. Thompson, P. 92 of Vol. I of Record in *Parris, et al* v. *Prichard, et al;* P. 123 of Vol. I of Record of *Du-Val, et al* v. *Prichard, et al.)*

In the legislature's reapportionment scheme, the City of Norfolk was delineated seven (7) delegates. (39th District, Joint Appendix, P. 29.) Although it was underrepresented (5.4%), the integrity of the City of Norfolk's boundary line was maintained.

---

[1]Two appendixes appear in this cause: One entitled "Joint Appendix of the City of Virginia Beach and Virginia State Board of Education – Joan S. Mahan, et al", to be hereinafter referred to as "Joint Appendix"; and a second appendix hereinafter to be referred to as "Appendix."

The District Court's reapportionment plan for the House also assigned seven (7) delegates to the 39th election district. However, the 39th District consisted of 307,951 residents of the City of Norfolk and 29,136 residents of the City of Virginia Beach. (Joint Appendix, P. 14.) In addition, the District Court's plan co-mingled residents of other political subdivisions, disregarding political subdivsion boundary lines. (Joint Appendix, Pp. 1-25.)

The co-mingling of residents of political subdivisions was apparently done by the District Court to meet the

constitutional test that all reapportionment plans, congressional, state and local, must be adopted in "a good faith effort to achieve mathematical exactness". *Wesberry* v. *Sanders,* 376 U.S. 1 (1964) and *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969).

Whether "mathematical exactness" is the test for federal, state and local reapportionment plans, it is assumed, is the issue to which this Court granted probable jurisdiction. *Connor* v. *Williams,* U.S. , 30 L. Ed. 2d 704, 706 (1972).

Although it was not damaged by the District Court's Opinion and Order dated July 2, 1971, the City of Norfolk submits to this Court that representatives elected from within traditional boundary lines of political subdivisions in one chamber of a state bicameral legislature, as advocated by the Attorney General of Virginia and City of Virginia, are more important than numbers alone, which result from representation measured by "mathematical exactness".

ARGUMENT

I.

A STATE REAPPORTIONMENT PLAN CONSISTING OF A BICAMERAL LEGISLATURE IN WHICH ONE CHAMBER HAS ELECTION DISTRICTS DESIGNED BY "MATHEMATICAL EXACTNESS" AND THE OTHER CHAMBER RETAINS TRADITIONAL POLITICAL SUBDIVISION BOUNDARY LINES IS A VALID CONSTITUTIONAL PLAN.

Both the Attorney General of Virginia and the City of Virginia Beach have persuasively briefed the law and merits of the issue concerning the maintenance of traditional boundary lines of political subdivisions in one chamber of a bicameral legislature. It is not the City of

Norfolk's intention to repeat these arguments.

However, it is important for this Court to understand that interests of abutting political subdivisions can be adverse.

To illustrate these adverse interests, the City of Norfolk will attempt to be candid with the Court as well as fair to the City of Virginia Beach in setting forth some adverse interests between the two cities.

A description of the two cities shows a remarkable difference in itself. Norfolk is an old seaport city, the location of one of the largest naval bases in the world. Norfolk is essentially urban and the commercial center of Tidewater, Virginia. It is fronted on three sides by water and abuts the boundaries of the municipalities of Virginia Beach and Chesapeake.

The City of Virginia Beach is a relatively new municipal corporation which can be described as "suburbia". It has been said that Virginia Beach is the bedroom of the white middle to upper economic classes who are employed in Norfolk. (Virginia Beach may not agree to this description.) Virginia Beach is also a summer resort center as well as the site of military bases.

The City of Norfolk has the same financial problems as other urban centers. Its boundaries are fixed, with no prospect of outward growth. It must rely presently upon regressive real estate taxes, in addition to license taxes, for its principal revenue. As much as fifty percent of its land is exempted from taxation by federal and state law.

To combat the lack of revenue channels, Norfolk has actively solicited authorization of the General Assembly for a local occupation or piggy-back income tax.

Needless to say, the bedroom communities of Norfolk have been unified in opposition to such an occupation tax.

Another adverse interest centers upon Norfolk's owning a very sophisticated water collection and distribution system, valued at from fifty to one hundred million dollars, depending on various consultants' opinions.

Virginia Beach, over the years, has negotiated with Norfolk for purchasing water. Much controversy has existed over the price differential charged residents of Norfolk and Virginia Beach.

Virginia Beach would like to have utilities furnished by municipal corporations regulated by the Virginia State Corporation Commission, while Norfolk is for the *status quo*.

Norfolk, being landlocked, has redeveloped much of its older slum sections. Its concern is the use of these redeveloped lands.

In turn, Virginia Beach is concerned with planning the land use of rural areas. While Virginia Beach is growing spectacularly, it has difficulty meeting the increased demand for services, such as schools, sewers, fire protection and police.

As indicated, Virginia Beach's residents are the middle and upper classes, while Norfolk is concerned with its increasing welfare rolls.

Finally, the most recent adverse interest is concerned with the issue of merging school districts by court order for the purpose of integrating predominantly black urban school systems with predominantly white suburban school systems.

As this Court knows, The School Board of the City of Norfolk, Virginia, has been involved with litigation for fifteen years over the issue of integration of its school system. (Civil Action No. 2214, In the United States District Court for the Eastern District of Virginia, Norfolk Division — Leola Pearl Beckett, et al, Plaintiffs, and

Carlotta Mozelle Brewer, et al, and United States of America, Plaintiff-Intervenors, v. The School Board of City of Norfolk, Virginia, et al, Defendants, and David E. Allgood, et al, Defendant-Intervenors.)

The threat now facing the school system is resegregation. Over 7,000 white students have departed from the City of Norfolk school system since massive busing was ordered by the courts.

This matter is pointed up only to illustrate that favorable discussions concerning the merger issue have been made in Norfolk, while unfavorable discussions, bordering on hysteria, have resulted in Virginia Beach.

The different interests illustrated are meant to emphasize to this Court that the present structure of state and local government in Virginia consists of separate political subdivisions. Even abutting municipal corporations have many adverse political, social and economic interests which should be represented separately in at least one chamber of a bicameral state legislature.

Today Norfolk stands before you not damaged by the District Court's Order. However, politics are never stationary and tomorrow it may well be the City of Norfolk which has lost its identity in the state legislature.

"Mathematical exactness" should not be the sole test of the Virginia legislative reapportionment plan designed in good faith by the General Assembly to represent the residents of Virginia.

II.

ASSUMING "MATHEMATICAL EXACTNESS" TO BE THE TEST REQUIRED HEREIN, NO POLITICAL SUBDIVISION SHOULD HAVE STATUS TO OBJECT TO ITS RESIDENTS BEING CO-MINGLED WITH RESIDENTS OF OTHER POLITICAL SUBDIVISION.

Although the City of Norfolk strongly advocates that "mathematical exactness" is not the constitutional test in this case, it submits that, if it is, no political subdivision should have status to object to a state reapportionment scheme.

The City of Virginia Beach argues that it is discriminated against under the District Court's plan because its residents have been co-mingled with residents from other political subdivisions. Specifically, it objects to 29,136 of its residents being co-mingled in House of Delegates election district 39 (Joint Appendix, P. 14), a multimember district of seven delegates of which 307,451 persons are residents of the City of Norfolk.

In addition, the City of Virginia Beach cites that 40,195 of its residents vote in a multimember senate district, with 307,951 residents of the City of Norfolk.

As a result, Virginia Beach argues it has no identity in either legislative chamber under the District Court's plan.

As previously noted, the City of Norfolk is sympathetic to the City of Virginia Beach's claim that in the state legislature it has lost its representative identity.

However, also as previously noted, the District Court was of the opinion that the law requires the constitutionality of state legislative reapportionment plans to be tested by the standard of "mathematical exactness". *Wesberry* v. *Sanders,* 376 U.S. 1 (1964) and *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969).

It is believed that there is no controversy to the fact that political subdivisions are not created upon the principle of their population being equal. Political subdivisions are designated specific boundary lines in their charters, usually based upon traditional and geographical boundaries.

Therefore, assuming the District Court was correct in using the "mathematical exactness" test, no single political subdivision should have status to object that residents within its boundary lines were co-mingled with residents of another political subdivision.

"Mathematical exactness" is not a geographical or political interest measuring device, but pertains only to equality of numbers in election districts. In what political subdivision a person lives is not relevant.

In addition, it is not disputed that both the General Assembly's and the District Court's reapportionment schemes were based upon the United States Census Bureau's Population Enumeration. In devising election districts that are mathematically exact, the computation and designation of census tracts (numbers of persons) involve much discretion. No political subdivision should have status to object to this discretion.

Finally, to sustain a political subdivision's charge that it has been discriminated against when its residents have been co-mingled with residents of another political subdivision would lead to utter chaos in the dockets of the district courts. Constitutional challenges from political subdivisions would arise after each legislative reapportionment.

Accordingly, although the City of Norfolk has advocated herein that "mathematical exactness" should not be the test to be applied to state reapportionment plans, if it is, the City of Virginia Beach should not be given status to object to the fact that residents of Virginia Beach and Norfolk were co-mingled in one election district.

III.

ALL PARTIES WERE GIVEN AN OPPORTUNITY TO PRESENT THEIR CASE TO THE DISTRICT COURT.

Assuming once more that the District Court was correct in ruling the Virginia legislative reapportionment plan to be invalid, what were the alternative remedies available to the District Court?

A.

Certainly it is well settled that the District Court could have ruled the plans to be invalid, and if the legislature had not failed to meet its constitutional obligations and time was not of the essence, the District Court could have returned the plan back to the legislature. *Ely* v. *Klahr,* 403 U.S. 108, 114 n. 6 (1971); *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964).

B.

Additionally, the District Court could have announced minimum percentage guidelines upon which the legislature could proceed to devise a plan, but this would have been an advisory opinion. This Court and most other courts refuse to render advisory opinions. *Roth* v. *Delano,* 338 U.S. 226 (1949); 20 Am. Jur. 2d (Counts Sec. 75) at Pp. 437-438.

In addition to the Court's reluctance to render advisory opinions, the parties to this case in the District Court were mostly members of the legislature who had been unable or unwilling to devise a plan that all parties agreed was valid.

The district judge in the case of *Bussie* v. *Governor of Louisiana,* 333 F. Supp. 452 (1971), District Court sustained by the 5th Circuit on September 14, 1972, said at page 461:

> "Secondly, the very parties who appear to be the primary parties at interest in these suits, . . . , all had an active part in the abortive attempt of the legislature to reapportion itself in 1971. For this court to have assumed for one

moment that these parties could suddenly get together and come up with an acceptable plan . . . , would have been presumptious indeed . . . ."

C.

Finally, the District Court could have devised a plan of its own, which in fact it did.

The appellants, however, assert that the Court abused its discretion by devising its own plan.

First it should be pointed out that the plan adopted by the District Court had been devised by the Privileges and Elections Subcommittee for the purpose of having a plan where all election districts were below a five percent deviation from the optimum. The plan was given to the District Court by the Chairman of said Committee, James M. Thompson, an intervenor herein in the District Court. The full Committee did not adopt the plan and it died in Committee.

Secondly, although the issue at the trial was reapportionment, and knowing full well that this same District Court had previously revised an invalid Virginia reapportionment plan itself (*Davis* v. *Mann,* 213 F. Supp. 577, affirmed 377 U.S. 678 (1964)), no party other than the Chairman of the Privileges and Elections Committee submitted any alternative plans to the District Court. Certainly, if other plans had been submitted the District Court would have considered them.

IV.

THE CITY OF VIRGINIA BEACH HAS NO STATUS TO OBJECT TO THE DISTRICT COURT'S REAPPORTIONMENT PLAN

As was vividly pointed out in the District Court's Order dated July 13, 1971, denying the City of Virginia Beach's Motion for a stay of the District Court's Order dated July 2, 1971, the City of Virginia Beach did not

intervene, argue, brief or attempt to raise the issue of reapportionment until after the District Court's Order was filed on July 2, 1971. (Joint Appendix, at pages 26 and 27.)

This Court has consistently ruled that it will not hear on appeal a party on an issue it did not raise in the lower court. *California* v. *Taylor,* 353 U.S. 553, 556-557, no. 2 & 3 (1957); *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330 (1967).

CONCLUSION

The structure of government in Virginia logically dictates the necessity of political subdivisions having representative identity in one house of a bicameral legislature. Even abutting municipal corporations have adverse interests that cannot be represented by the same legislator.

If the constitutional test for state legislative reapportionment plans is "mathematical exactness", the District Court's plan is valid.

Respectfully submitted
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CERTIFICATE OF SERVICE

I, Gordon B. Tayloe, Jr., counsel for the Appellee,

City of Norfolk, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief for the Appellee, City of Norfolk, in the United States Mails, first class postage prepaid, this 14th day of August, 1972, addressed to:

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FILE COPY

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Supreme Court of the United States

October Term, 1972

No. 71-564

JOHN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF ON BEHALF OF APPELLANTS

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Supreme Court of the United States

October Term, 1971

No. 71-364

JOAN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,
v.
HENRY E. HOWELL, JR., ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,
v.
CLIVE L. DUVAL, 2D. ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,
v.
STANFORD E. PARRIS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

REPLY BRIEF ON BEHALF OF APPELLANTS

PRELIMINARY STATEMENT

We respond here to appellees' arguments on the three issues now before this Court: (1) appellee DuVal's conten-

tion that "one man, one vote" principles preclude Virginia's determination that one house of its legislature (the House of Delegates) should give representation to political subdivisions; (2) appellee Howell's contention that Virginia is not permitted to apportion the other house (the Senate) on the basis of the decennial Census; and (3) the question whether—even assuming some malapportionment—the court below erred in decreeing its own apportionment plan rather than allowing the Virginia General Assembly a reasonable opportunity to reformulate its plan. There is no longer any issue before this Court concerning the Voting Rights Act.[1]

ARGUMENT

1.

Arithmetic Is Not The Sole Determinant Of The Propriety Of The Plan For The House Of Delegates.

Appellee DuVal argues simplistically that the House of Delegates is malapportioned because it involves percentage deviations from district to district that are greater than those involved in a number of lower court cases where re-

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[1] The Voting Rights Act appeal originally consolidated with the present case (*Thornton* v. *Prichard*, No. 71-553) was dismissed on appellant Thornton's own motion after our opening brief had been filed. Although Thornton has filed a brief as an appellee in which he refers to the Voting Rights Act, he concedes (Thornton Br. 3) that no such issue is now before the Court. Accordingly, the Court need not consider pages 60-74 of our opening brief and we have no occasion to discuss Thornton's position further, except to note the inaccuracy of his suggestion that the court below has not entered an appealable final judgment. Thornton himself gave the point away in his Jurisdictional Statement (p. 10) where he states that the district court "retained jurisdiction to enforce its order, but in all other respects the order, although called 'interlocutory' was in effect, final." *See, Angel* v. *Bullington*, 330 U.S. 183, 189 (1947).

apportionment plans have been disapproved. He refuses to give any weight to the Commonwealth's considered decision that this one house of its bicameral legislature should afford representation to existing political subdivisions, or to the finding below that the House plan comes as close to population equality as is possible "if the integrity of political subdivisions is mandated." (J. App. 5.)

DuVal's "numbers game" would reduce to absurdity this Court's statement that the basic principle of legislative apportionment is "fair and effective representation for all citizens." *Reynolds* v. *Sims,* 377 U.S. 533, 565 (1964). It would deny the States any significant choice concerning the form of their own legislative systems. When, as here, the issue relates only to one house of a State legislature and the other house is characterized by nearly exact population equality through the use of single-member districts, we submit that the determination must be based on the answers to two somewhat more subtle questions: (1) Is the apportionment of the house in question based on a permissible rationale? (2) Does the plan approach population equality as closely as possible in consistency with that rationale?

The answer to the last question is unquestionably affirmative in this case, and the district court so found. (See J. App. 5.) The first question—whether reasonable representation of political subdivisions is a permissible rationale—was answered affirmatively by this Court in *Reynolds* v. *Sims, supra*:

> [A] state can rationally consider according political subdivisons some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. 377 U.S. at 580.

There is no substance to DuVal's argument that Virginia

has not in fact consciously chosen an independent-representation rationale for the House of Delegates. The fact that there are "no provisions in Virginia's Constitution requiring reapportionment plans to conform to county and city lines" (DuVal Br. 20) is irrelevant and inconsistent with the principle of State (as distinct from federal) constitutional law that "the state constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited; that except so far as restrained by the Constitution the legislature has plenary power." *Strawberry Hill Land Corp.* v. *Starbuck,* 124 Va. 71, 97 S.E. 362, 364 (1918). Thus what is important is not what is absent from the words of the state constitution, but what the legislature has enacted. *See also Sixty-Seventh Minnesota Senate* v. *Beens,* 406 U.S. 187, 198 (1972).

It is not inconsistent with the independent-representation rationale that Senate districts ignore city and county lines in favor of numerical equality (DuVal Br. 21); indeed, it is that very approach to one house that permits the focus on political subdivisions in the other. Similarly, the approach that Virginia has taken to *congressional* redistricting is irrelevant to the approach it is constitutionally permitted to take to the different problem of the redistricting of one house of the State Legislature. Nor is there any inconsistency in the legislature's treatment of the special problems created by Fairfax County's exceptionally large population[2] and by the

[2] As we have explained in our opening brief (p. 24 n. 9) Fairfax County is not "fragmented" but rather has simply been divided into two districts that more closely approximate the size of the other subdivisions that are represented in the House of Delegates. This is a refinement of the basic rationale designed to achieve more rather than less population equality.

remote potentiality of future annexations to existing subdivisions.[3]

Accordingly, we submit that the House of Delegates plan cannot be faulted unless the Court were to accept DuVal's proposed percentage-deviation rule as an inexorable yardstick for both houses of a bicameral state legislature. For the reasons we have given, such a rule would be inconsistent both with this Court's approach to the problem and with a governmental system that allows the States reasonable flexibility in structuring their own governmental systems to comport with local needs. Equally, with one exception it is inconsistent even with the lower court cases that DuVal cites as precedents.[4]

Two of the alleged percentage-deviation precedents are now before this Court for review, but even they were not decided on a simple arithmetic rationale. In *Cummings* v. *Meskill,* 341 F. Supp. 139 (D. Conn 1972), *prob. juris. noted sub. nom. Gaffney* v. *Cummings,* 41 L.W. 3183 (Oct. 10, 1972), the lower court found a lack of fair and effective representation because the state had "balanc[ed] the results [of the reapportionment] for partisan political fairness, that

[3] The provision for future boundary changes is designed to create reasonable stability by obviating redistricting in the event of future annexations. In any event, this provision has no foreseeable impact in view of the moratorium against such annexations that is now in force. Chap. 712, 1972 Acts of Assembly.

[4] *Skolnick* v. *Illinois State Electoral Board,* 307 F. Supp. 691 (N.D. Ill. 1969), did simply compare the numerical variations in *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969), as a basis for striking down the apportionment of the Illinois legislature. Precisely the same variances had just four years previously been declared valid by the same court, as well as by the Supreme Court of Illinois. *Germano* v. *Kerner,* 247 F. Supp. 141 (N.D. Ill. 1965); *People ex rel. Engle* v. *Kerner,* 210 N.E. 2d 165 (Ill. 1965). The resulting confusion is apparent.

is, to achieve an apparent balance of partisan political strength in the Assembly coinciding with the total state-wide partisan political balance measured by the results in the last three Assembly elections." 341 F. Supp. at 148. There is no such factor here, and furthermore that case does not involve any attempt, as here, to keep political boundaries intact. In *Graves* v. *Barnes,* 343 F. Supp. 704 (W.D. Texas 1972), *prob. juris. noted sub. nom. Bullock* v. *Register,* 41 L.W. 3183 (Oct. 10, 1972), the rejection of Texas' plan was based on a lack of rational and consistent State policy. As we have shown, the Commonwealth's plan does not lack a rational or consistent base.

Similarly the other cases relied on by DuVal go far beyond arithmetical calculation. In *Troxler* v. *St. John the Baptist Parish Police Jury,* 331 F. Supp. 222 (E.D. La. 1971), there had been "no attempt to justify any of the population deviations. . . ." (331 F. Supp. at 224), and each urban area involved had been divided into fragments scattered among predominantly rural districts. *Driggers* v. *Gallion,* 308 F. Supp. 632 (M.D. Ala. 1969) was decided on the basis of effective representation, not numbers; the court found greater equality to be practicable and rejected the only justification forwarded for the deviations—a guarantee of representation to the rural parts of the county. The same is true of the two Kansas cases, *Long* v. *Docking,* 282 F. Supp. 256 (D. Kan. 1968), and 283 F. Supp. 539 (D. Kan. 1968), decided one month apart. In the first case no justification was forwarded for the variance other than that the deviation was close enough and other cases had upheld larger variations—the reverse of appellee's argument. The Kansas legislature's next attempt at districting was rejected because "the evidence reveal[ed] that plans were offered to

the legislature which would have established districts with no greater population differences, with more compact districts, and with much fewer crossing of county lines. The evidence . . . leads to the conclusion that a majority of the members of the legislature, and more particularly the members of the State Senate, were motivated by other considerations than the constitutional objective of 'practical equality.' " 283 F. Supp. at 543. The most recent Iowa case, *In re Legislative Districting of Gen. Assembly,* 193 N.W. 2d 784 (Iowa 1972), similarly went far beyond a mere finding of percentage deviation; the problem there was that once an assumed "safe" percent deviation had been reached, all efforts to achieve further voter equality were abandoned and district lines were established based upon impermissible considerations. The earlier Iowa decision, *In re Legislative Districting of Gen. Assembly,* 175 N.W. 2d 20 (Iowa 1970), similarly found that the legislature adopted a *"de minimis"* standard . . . rather than equality 'as nearly as practicable' " (175 N.W. 2d at 26); insofar as that State court further stated—unnecessarily—that population variances must be rejected if they "exceed variances held indefensible in *Kirkpatrick* . . . and in *Wells* . . ." (175 N.W. 2d at 24) it was, we submit, in error.

2.

The Virginia Senate Was Properly Apportioned Into Single Member Districts Based On The 1970 Census.

Appellee Howell's brief provides no support for the district court's rejection—in the case of the Senate seats for the City of Norfolk—of *both* the Virginia Constitution's mandate that apportionment be based on population as determined by the decennial census *and* the Virginia legislature's decision that

senatorial districts should have single rather than multiple members.

The State constitutional decision to use the census—in terms of which the three seats in question were apportioned with near-perfect equality—was explicit and carefully considered. This is shown by the record of the debate on Article II, Section 6 of the current Constitution, which altered the previous reference to "inhabitants" (Sec. 55, Va. Const. of 1902):

> Senator Andrews: I hope it will be the pleasure of the Senate to reject the amendment [proposed by then Senator Howell to maintain the reference to "inhabitants."]
>
> The word used by your committee, the word "population," affords the broadest method we know of counting human beings. We used the word to update the language of the Constitution. When we reapportion, we reapportion on the decennial United States "population" census whose numbers we use and by which we are bound. The intent of the Privileges and Elections Committee, in using the modern word "population," is to include every living human being as counted by the decennial census of the United States Government.
>
> *Senator Howell:* I accept that explanation as constituting the constitutional interpretation of this Senate when they vote, and therefore I am withdrawing my amendment.
>
> *President Pollard:* The Senator withdraws the amendment. Senate Debates On Constitutional Revision, 1969, p. 88.

The question here, as in *Burns* v. *Richardson,* 384 U.S. 73 (1966), is whether a State has such a choice in the treatment it gives to more or less transitory individuals, such as students, migratory workers, long-distance commuters and (as here) military personnel. In *Burns,* the Court held that a State could choose to exclude some such individuals, but in

the process it left no doubt that a State could also choose to include them in a district as Virginia did in Norfolk.

> *"The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless a choice is one the Constitution forbids, cf., e.g., *Carrington* v. *Rash,* 380 U.S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby. [384 U.S. at 92; emphasis added.]

See also *YMCA, Inc.* v. *Lomenzo,* 377 U.S. 633, 641 (1964); *Prince* v. *Kramer* F. Supp. (W.D. Wash. 1972), *aff'd sub. nom. Washington State Labor Council* v. *Prince,* 41 L.W. 3167 (Oct. 10, 1972).

As the testimony of the Associate Director of the Bureau of the Census (App. 206-207) shows, the census treatment of the naval personnel here in question is based upon a long-standing, carefully considered pragmatic determination as to where such personnel should be placed "to avoid double counting; to avoid undercounting" (App. 207). Counting such personnel as on the ship to which they are assigned reflects the reality that "this is where they work, this is where they live during a considerable period of time, during a majority of their time and even when they are in port I understand they can leave the ship only at the . . . pleasure of the commander." (App. 207; see also App. 194.) And where they are for the majority of their time is where there is an "increased volume of demand for public services, e.g., police and fire protection, water supply, sewage disposal, highways, schools, and other county and municipal services." (App. 184.)

Virginia appropriately chose to incorporate this census decision—as well as all of the other principles of population allocation evolved in the census; this decision was, moreover, consistent with the approach to military personnel that Virginia had traditionally followed. See *Davis* v. *Mann*, 377 U.S. 678, 691-692 (1964).

The decision below would disrupt this consistent application of the decennial census on the basis of a Zip Code sample that the record demonstrated to be inaccurate. (See our opening brief at p. 36 n 13; J. App. 183, 200-203.) Unless there were some principle requiring each state to make an impossible effort to determine the domicile or voting residence of each and every person (with all the other problems about aliens, non-voters and other kinds of transients which this would raise but which the district court did not consider), such *ad hoc* disruptions of a consistent, reasoned approach should not be allowed. *Burns* v. *Richardson, supra,* makes it clear that there is no such principle, and that the courts must honor Virginia's policy of giving representation to its people where they are the majority of the time.

The result of the lower court's tampering with the census was a direction that Norfolk be converted into a multi-member Senate district, vitiating also the State's uniform policy of single-member representation. This compounds the error:

"Choosing between specific single-member legislative districts and multi-member districts is essentially a choice between political theories of representational democracy. That decision, once made by the Legislature, which all agree is the body primarily responsible for political decisions, is to be disturbed by the judiciary only upon specific proof that the adopted scheme of redistricting is actually functioning in a manner that minimizes or cancels out the voting strength of a cognizable racial or political element of the voting popu-

lation." *Chavis* v. *Whitcomb,* 305 F. Supp. 1364 (1969), reversed on other grounds, *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971).[5]

3.

In Any Event, The District Court Improperly Dictated A Districting Plan Without Allowing Virginia An Opportunity To Reapportion Itself.

Our opening brief amply shows the error of the district court's precipitous order—even assuming *arguendo* the correctness of its rejection of the Virginia plan—and appellees' attempts to justify it are without substance. The Virginia General Assembly was, as we have shown, ready to reconvene upon short notice in order to implement any decision that the district court might reach;[6] the court made no findings to the contrary or any effort to justify otherwise its displacement of the State legislative function by issuing a redistricting order simultaneously with its decision of invalidity.

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[5] Appellee Howell's further argument that the single-member districts in Norfolk would impermissibly dilute the black vote there is based on factual assertions concerning which the district court made no findings and also ignores other pertinent facts; the record shows (J. App. 173-174) that the nonwhite minority in two of the three Norfolk Senate districts would be a larger percentage than it is in the city as a whole. Moreover, the short answer to this contention is that the Attorney General of the United States has found no violations of the Voting Rights Act. (J. App. 54) Howell's Remaining Contention—that Federal regulations prohibited campaigns on naval shore installations—is completely irrelevant to apportionment principles. Additionally such regulations may not be as prohibitive as asserted. See *e.g., Flower* v. *U.S.,* 407 U.S. 197 (1972); *Spock* v. *David,* ..... F.2d ....., 41 L.W. 2242 (3rd Cir. 1972) *stay denied; Laird* v. *Spock,* 41 L.W. 3271 (Nov. 3, 1972).

[6] For the convenience of the Court we have set forth, as an appendix, a narrative chronology of the General Assembly's actions.

Appellees' attempts at *post hoc* justification of the district court's procedure are without substance:

(a) The subsequent inaction by the 1972 Session of the General Assembly in no way cures the error of the court's 1971 order. Surely the Commonwealth is entitled to pursue its appellate remedies (as House Joint Resolution 110 of the 1971 Session directed the Attorney General to do) without rendering those remedies moot. By the same token, it obviously had no obligation to attempt to anticipate the district court's decision before it was decreed.

(b) A validation by this Court of the General Assembly's plan would cause no disruption. All members of the House of Delegates are to be elected in November 1973 (§24.1-11, Code of Virginia (1950), as amended), and they would simply run for election from those districts originally established by the General Assembly in 1971. At the same time a special election could be held for the three senators whose districts are involved in this appeal. *Mann* v. *Davis,* 238 F. Supp. 458 (E.D. Va. 1964), *aff'd.* 379 U.S. 694 (1965). No "legislative vacuum" would exist. The laws enacted by the General Assembly at its 1972 session would certainly be valid and no disruption of government would occur. *See, e.g., Mann* v. *Davis,* 245 F. Supp. 241, 246 (E.D. Va. 1965), *aff'd. sub nom. Burnette* v. *Davis,* 382 U.S. 42 (1965); *Ryan* v. *Tinsley,* 316 F. 2d 430 (10th Cir 1963), *cert. denied* 375 U.S. 17 (1963).

CONCLUSION

For the foregoing reasons we submit that the decision of the lower court should be reversed and the cause remanded with instruction to dismiss the complaints or, failing that, to allow the Virginia General Assembly an opportunity to re-

district itself, in accord with constitutional principles this Court may establish in its opinion.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Special Assistant to the Attorney General for the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, hereby certify that three (3) copies of the foregoing Reply Brief on Behalf of Appellants were on this 28th day of November, 1972 mailed to:

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The facts in this case are that the legislature met on January 6, 1971, as mandated by the revised Virginia Constitution, *Schedule,* Section 5. It completed its reapportioning responsibilities including enactment of legislative and congressional redistricting plans, on February 26, 1971. Between that date and adjournment *sine die* on July 8, 1971, the Journals of both Houses show a legislature willing to insure that its reapportionment plans complied with constitutional requisites, as interpreted by the federal executive branch of government on the one hand and the federal judiciary on the other.

Having fulfilled the mandate of the Virginia Constitution, the Assembly on Friday, February 26, 1971, adjourned "to stand in recess until March 29, 1971." (HJR 82, Senate Journal, p. 528.) The redistricting plans were submitted to the Attorney General of the United States, on the following Monday, March 1, 1971, for review under the Voting Rights Act. (J. App. p. 51.) It was anticipated that the Attorney General would expedite consideration of the plans. He did not. (J. App. p. 51.)

The Assembly on March 29, 1971, reconvened in accordance with House Joint Resolution 82. Since neither the At-

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Section 5. First session of General Assembly following adoption of revised Constitution.

The General Assembly shall convene at the Capitol at noon on the first Wednesday in January, nineteen hundred and seventy-one. It shall enact such laws as may be deemed proper, including those necessary to implement this revised Constitution. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with Article II, Section 6, of this Constitution. The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; that the salary and allowances of members shall not be limited by Section 46 of the Constitution of 1902 as amended and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative.

torney General nor the lower court had taken any action, the Assembly on that date "adjourned to stand in recess until Monday, May 10, 1971, at 12 o'clock noon, unless reconvened sooner by the Governor or the Speaker of the House of Delegates and President of the Senate." (HJR 93, Senate Journal, p. 640.) This date, May 10, 1971, allowed for more than the statutory sixty days in which the Attorney General would complete his review. Such review was completed, though not within sixty days, on Friday, May 7, 1971. (J. App. p. 51.)

The Attorney General objected to the division of Senatorial districts five (5) and six (6) in the City of Norfolk. He further objected to multi-member district House seats in five cities of the Commonwealth. The latter objection was based on a prognostication of affirmance of the District Court's order in *Chavis* v. *Whitcomb, supra.* (J. App. p. 52.) The Assembly reconvened on May 10, 1971. (Senate Journal, p. 644.) Since *Whitcomb* v. *Chavis, supra,* was still awaiting decision by this Court, and the validity of the plans including the Senate and House districts objected to by the Attorney General was pending trial in the lower court, the Assembly decided to "stand in recess until Tuesday, June 22, 1971 at 12 o'clock noon, unless reconvened sooner . . ." (HJR 98, Senate Journal, pp. 656-657.) This date allowed for a decision by the lower court as well as a decision in *Chavis* by this Court prior to its summer recess.

The lower court's "Order on First Hearing" (J. App. p. 43.) entered on May 24, 1971, brought the General Assembly back into session on Thursday, June 3, 1971. (See Senate Journal, p. 662.) This order required the General Assembly to cure the objections interposed by the Attorney General. (J. App. p. 45.) Senate Bill 125 was introduced to comply with the lower court's order

to cure the objections that the Attorney General interposed to the Senate Districts. (Senate Journal, p. 664.) As to the objections interposed by the Attorney General to the House districts, the Assembly adjourned to June 7, 1971, to await this Court's decision in *Chavis*. (Senate Journal, p. 669.) On Monday, June 7, 1971, the Assembly reconvened. This Court on that same date handed down its decision in *Whitcomb* v. *Chavis, supra;* the Attorney General rightfully withdrew his objections to the House plan (J. App. p. 53); the Assembly passed Senate Bill 125 (Senate Journal, pp. 667, 700) and "adjourned to stand in recess until Monday, August 16, 1971 at 12 o'clock noon, unless reconvened sooner," (HJR 105, Senate Journal, p. 702) thus awaiting the lower court's decision. The lower court entered its decision on July 2, 1971, ordering into effect its own plan of reapportionment. The Assembly, other than requesting an appeal of such decision, could take no further action and adjourned *sine die*. (See HJR 111, July 8, 1971, Senate Journal p. 747-8.)